Key to Briefs

1 - Statement as to Jurisdiction, no. 36
2 - Separate Appendix to Statement as to Jurisdiction Containing Relevant Opinions, Reports and Orders, no. 36
3 - Motion to Advance Case and for Further Relief in Connection therewith, no. 36
4 - Motion to Advance Case, no. 36
5 - Motion for Leave to Join in Jurisdictional Statement filed by Defendant-Appellant, Alleghany Corporation, no. 36
6 - Statement Suggesting Mootness and Motion to Affirm or Dismiss, no. 36
7 - Appellees' Statement in Opposition to Motion to Advance Case, no. 36
8 - Appellees' Reply to Appellant's Brief in Opposition to Appellees' Statement Suggesting Mootness and Motion to Affirm or Dismiss, no. 36
9 - Memorandum of Appellants Joseph S. Gruss, et al., on Behalf of Themselves and Other 6% Preferred Stockholders Similarly Situated, in Opposition to Appellees' Statement Suggesting Mootness
10 - Appellants' Brief in Opposition to Appellees' Statement Suggesting Mootness and Motion to Affirm or Dismiss, no. 36
11 - Brief for Appellant Alleghany Corporation, no. 36
12 - Brief for Appellants Joseph S. Gruss, et al., no. 36
13 - Reply Brief for Appellant Alleghany Corporation, no. 36
14 - Reply Brief (Preferred Stockholders) Appellants Gruss, et al., no. 36
15 - Appendix to Reply Brief for Appellants Joseph S. Gruss, et al., no. 36
16 - Memorandum on Behalf of Appellant Alleghany Corp., Submitted in Opposition to Appellees' Motion to Re-tax Costs, no. 36
17 - Motion to Re-tax Costs, nos. 36 and 82
18 - Brief for Appellant, Adelaide Neuwirth, nos. 36, 82, and 114

19 - Brief for the Interstate Commerce Commission, nos. 36, 82, and 114
20 - Brief for the United States, nos.36,82,114
21 - Brief for the Securities and Exchange Commission, Amicus Curiae, nos. 36,82, 114
22 - Brief for Appellees, nos. 36 and 114
23 - Application for Leave to File Supplemental Brief, and Supplemental Brief,nos.36,114
24 - Statement as to Jurisdiction, no. 82
25 - Statement in Opposition to Appellees' Motion to Dismiss, no. 82
26 - Jurisdictional Statement, no. 114
27 - Petition for Rehearing, nos.36, 82, 114

3. Did the District Court err in holding that, if Alleghany controls The New York Central Railroad Company (Central), the carrier parent of numerous carrier subsidiaries which, with Central, constitute a single established railroad system, its acquisition of such control was a non-carrier acquisition of control of two or more carriers, subject to ICC approval and authorization under §5(2)?

4. Did the District Court err in holding that, if Alleghany controls Central, the transaction approved and authorized by the status orders under §5(2), which involved a merger of the properties of one Central subsidiary into another and a lease by the latter to Central of the properties so merged, did not constitute a non-carrier acquisition of control by Alleghany of the properties so merged and leased, within the meaning of §5(2) and subject to ICC approval and authorization thereunder?

5. (a) Are the ICC's findings as to Alleghany's control of Central sufficient findings of control within the meaning of §§1(3)(b) and 5(4)?

(b) Do the facts admitted by the appellees before the ICC (respecting Alleghany's ownership of Central stock, its additional voting power, a common Chairman, common directors, common stockholders, and the large number of Central's stockholders) constitute evidence sufficient to support findings of control within the meaning of §§1(3)(b) and 5(4)?

(c) If the facts thus admitted are sufficient to support such findings, is any other asserted issue of control relevant?

6. Did the District Court err in holding that, in the absence of an explicit application by Alleghany under

§5(2) for approval and authorization of its acquisition of control of Central, there is no jurisdictional basis for remand to the ICC?

7. Did the District Court err in dismissing the defenses alleged in the appellants' answers?

Statement of the Case.

The principal facts of the case, including its administrative and legal history, are summarized below.

A. Alleghany's registration in 1940 under the Investment Company Act, its acquisition by 1943 of control of Chesapeake, the Marshall Transport decision in 1944, the ICC order dated June 5, 1945, and the SEC order dated October 4, 1945:

On November 1, 1940 Alleghany registered with the SEC under the Investment Company Act as a closed-end, non-diversified, management investment company.[3]

By April 1942 Alleghany had acquired control, through stock ownership, of Chesapeake & Ohio Railway Company (Chesapeake) and its carrier subsidiaries and affiliates comprising the Chesapeake System.[4] It had acquired such control without prior ICC approval and authorization under §5(2); and the ICC's subsequent objection to its acquisition of such control was based on its continuing control of carriers outside the Chesapeake System.[5]

---

[3] *In Re Alleghany Corporation*, 20 SEC 731, 732; R. 193.

[4] *Chesapeake & Ohio Railway Company Purchase*, 261 ICC 239, 252.

[5] The ICC viewed Alleghany's acquisition of control of Chesapeake as an unauthorized transaction within the scope of §5(2) and hence a violation of §5(4), upon the ground that Alleghany already controlled one or more carriers outside the Chesapeake System; and it instituted an investigation proceeding respecting the asserted violation (Finance Docket No. 29085). The asserted violation was cured by the voting trust agreements approved in the *Chesapeake Purchase Case, supra* fn. 4, and the investigation proceeding was discontinued by the order in that case (R. 185).

In April 1944 this Court decided *U. S.* v. *Marshall Transport Co.*, 322 U. S. 31, holding: that a proposed purchase of the properties of an independent carrier by a carrier subsidiary of a non-carrier parent would constitute an acquisition of control of such properties by the non-carrier parent under §5(2); that the non-carrier parent was therefore a necessary party to an application for ICC approval and authorization of the purchase under §5(2)(b); and that, as such a necessary party, the non-carrier parent would subject itself to ICC jurisdiction and regulation pursuant to §5(3).

On September 2, 1944 Chesapeake filed an application under §5(2), in Finance Docket No. 14692, for approval and authorization of its purchase of the properties of Norfolk Terminal & Transportation Company (Terminal), a wholly-owned Chesapeake subsidiary. On September 5, 1944 Alleghany, Chesapeake's non-carrier parent, filed a supplemental application under §5(2), which joined in Chesapeake's application and sought approval and authorization of Alleghany's acquisition of control of Terminal's properties through Chesapeake's purchase. The supplemental application stated that it was made in compliance with the decision in *Marshall Transport.*[6]

The ICC granted the applications and, in doing so, found and concluded, in substance and effect and either expressly

---

[6] *Chesapeake Purchase Case*, 261 ICC 239, 244-5, fn. 2.
The supplemental application did not ask either for retroactive approval and authorization of Alleghany's acquisition of control of Chesapeake and the Chesapeake System, or for approval and authorization of continuance of such control. A petition filed by Alleghany in Finance Docket No. 29085 (the investigation proceeding mentioned in footnote 5, *supra* p. 7) was construed by the ICC as implying a request for approval and authorization of *continuance* of such control, and was treated as an amendment of the supplemental application (*Chesapeake Purchase Case*, 261 ICC 239, 244-245).

or by necessary implication: that the purchase would effect "a change of (Chesapeake's direct and Alleghany's indirect) control" of Terminal's properties; that the changed control of those intra-system properties constituted a non-carrier acquisition of control by Alleghany under §5(2); that Alleghany was a necessary party under §5(2)(b); that the ICC had jurisdiction over the transaction and the parties, including Alleghany, whether or not Alleghany had lawfully acquired control of Chesapeake; and that a determination of the latter question was unnecessary "in taking (such) jurisdiction."[7]

---

[7] The ICC said (261 ICC 239, 260-261):

> "The application of Alleghany, as above indicated, seeks authority *to acquire control by it, through the Chesapeake & Ohio, of the properties of the Terminal Company* described in the Chesapeake & Ohio application as well as control of the Chesapeake & Ohio and its affiliated companies. The two applications contemplate a change of existing control, in that the Chesapeake & Ohio would control, through purchase, the properties of Terminal, instead of control through stock ownership and by lease, and Alleghany's control of the two companies would likewise be changed. Such 'internal rearrangement of corporate structure' must have our approval under section 5(2) of the act or be unlawful. *Warrior & Gulf Nav. Co. Control*, 250 ICC 26, 28; *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473, 475, and *Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M. C. C. 469, 471. This is true whether Alleghany's present control of Chesapeake & Ohio and its affiliated companies be regarded as a lawful continuation of preexisting control or an unauthorized resumption of interrupted control. It is, therefore, unnecessary to determine this question in taking jurisdiction in the present case."

The ICC's references to Alleghany's application for authority "*to acquire control*" of Terminal's properties through Chesapeake, to the resultant change in Alleghany's control of Chesapeake and Terminal, and the requirement of ICC approval under §5(2), constitute or imply a clear holding that the transaction involved a non-carrier acquisition of control within the scope of §5(2)(a), and that Alleghany was a necessary party to the application for its approval and authorization under §5(2)(b). Moreover, the ICC

Accordingly, on June 5, 1945 the ICC issued an order under §5(2) and pursuant to §5(3) which *inter alia* sub-

---

plainly held that the Terminal transaction provided an independent basis for taking jurisdiction over Alleghany.

Nevertheless, the District Court said that, in approving the purchase, the ICC

> "made no specific finding that the parent of the combined subsidiaries (whose presence in the proceeding was required for approval of another transaction), acquired control of the combined subsidiaries as a result of the purchase." (R. 665);

and it added in a footnote (R. 665-6, fn. 3):

> "The ICC made no finding that Alleghany acquired control as a result of Norfolk's purchase by C. & O. Nor does the Commission's opinion suggest that Alleghany would have been a necessary party to that application."

What the ICC's opinion does *not* suggest is that Alleghany was *not* a necessary party; the ICC could not hold, as it did hold, that the change in Alleghany's control required its approval under §5(2), without holding by plain implication that Alleghany was a necessary party; and Alleghany's supplemental application as a necessary party was filed 8 months before it was deemed amended, by a petition filed in the collateral investigation proceeding, to relate to the acquisition of control of Chesapeake. Moreover, the quoted comments of the District Court ignore the plain holding of the ICC that the Terminal transaction provided an independent basis for "taking jurisdiction (over Alleghany) in the present case."

It is true that the ICC's order does not contain an ordering paragraph relating to Alleghany's acquisition of control of Terminal's properties through Chesapeake. But its preamble recites the filing of "a report containing (Division 4's) findings of fact and conclusions thereon, *which report is hereby referred to and made a part hereof*" (R. 183). There is no room for reasonable doubt, either, that the report found and concluded *inter alia* that the Terminal transaction involved an acquisition of control by Alleghany within the scope of §5(2), or that the basis of the resultant order, in respect of ICC jurisdiction over Alleghany, includes that finding and conclusion.

• • •

The *Chesapeake Purchase Case* was soon followed by *Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 ICC 546; and the latter case provides abundant collateral proof that the District Court misinterpreted the former. There, Central and Chesapeake, which jointly controlled Greenbrier through ownership of all its stock and a joint lease of its properties, applied for approval and authorization under §5(2) of the addition to the leased properties of a new

jected Alleghany to ICC regulation under §§20(1)-(10) and 20a(2)-11 "*unless and until otherwise ordered by this Commission*". (R. 183-185).

---

branch line. Alleghany filed a supplemental application for the same reasons that it had theretofore filed the supplemental application in the *Chesapeake Purchase Case*, namely: that the new lease transaction involved a non-carrier acquisition of control within the scope of §5(2), despite existing indirect control through stock ownership; and hence, that Alleghany was a necessary party under *Marshall Transport*.

Its presence in the proceeding was not required for approval of any other transaction.

Thereafter Alleghany moved for dismissal of its supplemental application on the ground that it had already been subjected to ICC jurisdiction and regulation by the order in the *Chesapeake Purchase Case*. In denying the motion the ICC said (261 ICC 546, 547-548):

> "The Alleghany Corporation controls the Chesapeake & Ohio through stock ownership. At the hearing counsel for the Alleghany moved that its supplemental application be dismissed for the reason that that company already has been subjected to the provisions of section 20 (1-10) and section 20a(2-11) as contemplated by section 5(3), in *Chesapeake & Ohio Ry. Co. Purchase*, 261 ICC 239. But in *United States v. Marshall Transport Co.*, 322 U. S. 31, the Supreme Court of the United States held that where a carrier subsidiary of a non-carrier corporation proposed to us to acquire control of another carrier's property and business by purchase thereof, we were without authority to approve such control unless the proprietary company controlling the applicant made application to us also. The principle enunciated in that decision is equally applicable to a transaction involving control by lease. Hence, we are forced to conclude that, although it is unnecessary to act again under section 5(3) in this proceeding, nevertheless the Alleghany is a necessary party to the instant application. The motion, therefore, is overruled."

The District Court not only ignored the significant juxtaposition in time of the *Chesapeake Purchase* and *Greenbrier* cases; it also said that the *Greenbrier* case is inapplicable to the case at bar because Greenbrier was controlled by two carrier parents instead of one, and the lease "could work a shift of power between the two (carrier) holding companies" (R. 668). Nothing in the *Greenbrier* case lends even a suggestion of support to this distinction. The lease did not change the relative power of Chesapeake and Central over Greenbrier; there was no acquisition of control by Chesapeake of properties it did not already control through stock ownership; and hence there was no such acquisition of control by Alleghany. The ICC held that Alleghany was a necessary party because the lease

The ICC did not order otherwise until it made the superseding status orders which were enjoined and annulled below (R. 446-448, 516-517).

Having been thus subjected to regulation under the Interstate Commerce Act, Alleghany applied to the SEC for an order pursuant to §8(f) of the Investment Company Act on the ground that, by definition in §3(c)(9) of the latter Act, such ICC regulation excluded it as an investment company thereunder. The SEC made an independent determination that, by virtue of the ICC order dated June 5, 1945, Alleghany was "subject to regulation under the Interstate Commerce Act" within the meaning of said §3(c)(9);[8] and, on October 4, 1945, it made an order declaring that Alleghany had ceased to be an investment company within the meaning of the Investment Company Act, and ordering that Alleghany's registration thereunder "shall forthwith cease to be in effect, *provided, however,* that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Commerce Act as set forth in such (SEC) Findings and Opinion, *this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing.*" (R. 185-186).

The SEC has not held any hearing and has not made any order respecting such revocation, suspension or modification.

---

involved an acquisition of control of the same properties that Chesapeake directly, and Alleghany indirectly, already controlled through stock ownership. This holding was not influenced in the slightest degree by the incidental and immaterial circumstance that Central was a joint carrier parent and lessee; and it is obvious that the same holding would have followed if Greenbrier had been a wholly-owned subsidiary of Chesapeake.

[8] *In Re Alleghany Corporation,* 20 SEC 731, 733-736.

The SEC also determined that, "by virtue of its control of Chesapeake and its subsidiaries," Alleghany was also subject to regulation under §12(1) (*id.* p. 735); *and ICC jurisdiction under that section does not depend on an application under §5(2) or an order under §5(3).*

B. Alleghany's divestment of its control of Chesapeake, its acquisition of control of Central, and the related administrative proceedings and actions which preceded the merger and lease application:

On January 19, 1954 Alleghany sold its remaining Chesapeake stock,[9] to enable it to execute its announced intention to gain control of Central without violating §5(4), and began the famous and successful proxy fight for such control (R. 322, 339, 614).

At the annual meeting of Central's stockholders, which began on May 26, 1954, they elected the entire slate of directors advocated by Alleghany, including Robert R. Young (the Chairman of Alleghany's Board of Directors) and Allan P. Kirby (the President and a director of Alleghany) (R. 217-218, 322, 568-571). Robert R. Young was elected Chairman of Central's new Board of Directors; and Thomas J. Deegan, Jr. (a Vice-President and a director of Alleghany) became a Vice-President of Central (R. 569, 571).

* * * * * *

During the course of the proxy fight three proceedings were instituted before the ICC, the nature and disposition of which bear on two of the questions presented by this appeal:[10]

In March 1954 Central requested the ICC, on its own motion, to investigate the transactions of Alleghany and Chesapeake to determine, among other things, whether

---

[9] Alleghany remained the beneficial owner until May 21, 1954 of stock of another carrier which had been deposited under one of the voting trusts approved by the ICC order dated June 5, 1945 (R. 657, fn. 7a).

[10] The nature, course and disposition of these proceedings is more fully recited in the Report of Division 4 dated March 2, 1955, in the proceedings which resulted in the status orders. The relevant portion appears in the section entitled *"Prior Proceedings related hereto"*. (R. 420-423).

Alleghany continued to control Chesapeake despite its claimed divestment of such control. The ICC denied this request for lack of sufficient grounds developed by its own inquiries, but expressly stated that the denial did not constitute a determination of the question thus raised (R. 420-421).[11]

In April 1954 Central petitioned for a declaratory order to the effect that Alleghany's acquisition of control of Central would constitute a non-carrier acquisition of control of two or more carriers within the meaning of §5(2). In May 1954 the ICC denied this petition as a matter of discretion (R. 421-422).

In May 1954 a bondholder's protective committee filed a complaint under §5(7) which again raised the issue of Alleghany's continuing control of Chesapeake. In August 1954 the complainants petitioned for leave to withdraw the complaint, which was accordingly dismissed without any determination on the merits (R. 422).[11]

* * * * * * *

Following Alleghany's divestment of control of Chesapeake and the successful conclusion of the Central proxy

---

[11] A similar question was raised in the proceedings under review, in a pleading filed by intervenors associated with the appellees and later adopted by the appellees (R. 280-281, 491).

The significance of this unresolved question, in relation to the holdings of the District Court, is obvious. It raises numerous questions, of which the following are random samples. Has every Alleghany stockholder, who prefers ICC regulation to SEC regulation, standing before the ICC to challenge the status orders insofar as they terminate the order of June 5, 1945, on the ground that Alleghany still controls Chesapeake? If so, would he have standing to review the status orders in case of an adverse ICC determination of that question? If survival of the order of June 5, 1945 depends exclusively on survival of the facts on which it was based, would not a future determination that Alleghany still controls Chesapeake nullify the erroneous termination of that order? And would not such a determination also nullify all intervening SEC regulation and render unlawful all intervening transactions subject to ICC approval and authorization under the Interstate Commerce Act?

fight, administrative actions were taken (by the ICC respecting its order dated June 5, 1945, and by the SEC respecting its order dated October 4, 1945) the nature and disposition of which have special significance in this case:

On June 22, 1954 the ICC ordered Alleghany to show cause on or before July 15, 1954 why its order dated June 5, 1945 should not be terminated, insofar as it related to Alleghany's status and regulation as a carrier under the Interstate Commerce Act (R. 423). On July 23, 1954 the ICC postponed action on the order to show cause to permit the filing of the merger and lease application which resulted in the superseding status orders (*id.*).

On July 7, 1954 the SEC ordered a hearing on July 27, 1954 to determine whether its order dated October 4, 1945 should be revoked, suspended or modified (R. 193). On October 15, 1954, after several prior adjournments to fixed dates (*id.*), Alleghany and the SEC entered into a written stipulation of further adjournment without date (Unprinted Record, pp. 2344-2345). The stipulation contained a provision respecting Alleghany's relationship to the SEC, conditioned upon ICC revocation, modification or suspension of the order dated June 5, 1945

> *"so as to relieve Alleghany from the necessity of compliance with Sections 20(1) to (10) and 20a(2) to (11) of the Interstate Commerce Act, as provided in said order of June 5, 1945. . . ."*

On October 18, 1954 the SEC issued an order, based on and conformable to the stipulation, which stated the SEC's opinion that it "may be appropriately granted *in the public interest and the interest of investors.*"[12]

---

[12] This order has been omitted from the Record. The reference to the Unprinted Record will be supplied at or prior to the argument.

C. The merger and lease application (Finance Dockets Nos. 14692 and 18656):

On September 20, 1954 the merger and lease application which resulted in the status orders was filed by Alleghany, Central, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (Big Four) and Louisville & Jeffersonville Bridge and Railroad Company (Bridge Company).[13] The application showed that Central controlled the Big Four through ownership of a large majority of its stock and under a lease of its properties, and that all of the Bridge Company's stock was owned by the Big Four and held by Central under the lease (R. 217).[14]

The application sought an order under §5(2) approving and authorizing: a merger of the Bridge Company's properties into the Big Four; a lease of the properties so merged, by the Big Four to Central; and the resultant acquisition of control of the properties so merged and leased, by Central and, through Central, by Alleghany (R. 210-11, 232-233). The application pointed out the parallel between Alleghany's existing relationship to Central and its subsidiaries and its relationship on June 5, 1945 and thereafter to Chesapeake and its subsidiaries, stated Alleghany's intention to increase its holdings of Central stock, referred to Alleghany's program of rehabilitation of the Central System and simplification of its internal

---

[13] The merger and lease application is dated September 17, 1954.

[14] The District Court erroneously referred to and decided this case as one "Where there is already *complete* stock control of the components of a system" and "which only involves *wholly* owned subsidiaries of a single holding company" (R. 668). The merger and lease application showed, and it was not disputed, that Central owned 98.98% of the Big Four's common stock and 86.45% of its preferred stock (R. 217). Since the Big Four was not a wholly owned subsidiary of Central, neither was the Bridge Company, which was wholly owned only by the Big Four.

structure, and requested an order "containing the condition that Alleghany shall continue to be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Act, as provided by Section 5(3) thereof." (R. 216-17, 233).

As to Alleghany's control of Central, the application alleged (R. 217-218): that Alleghany had "recently acquired control of the Central as the result of a proxy contest in which the slate of directors nominated by Alleghany was elected as the Central's Board of Directors"; that, in respect of the 6,447,410 outstanding shares of Central's common stock, Alleghany owned 15,500 shares directly and an undivided one-half interest in 600,000 shares, and was entitled to vote 615,500 shares or almost 10%; that Alleghany's Chairman and President were the respective beneficial owners of 100,200 and 300,100 shares of Central stock; that Central had 41,606 stockholders[15]; that Alleghany and Central had two common directors, of whom one was a common Chairman and the other was also the President of Alleghany; and that Alleghany and Central had a common Vice-President.

On December 31, 1954 Alleghany filed a supplemental pleading which showed that it then owned 286,000 shares directly (R. 263, fn. **) and hence, in view of its undivided one-half interest in 600,000 shares and its right to vote all of them, was entitled to vote 886,000 shares or approximately 14% of Central's outstanding common stock.

The application also showed that Alleghany and Central had at least one important stockholder in common, Allan P. Kirby (the President of Alleghany and a director of Central), who was the owner of 500,000 shares of Alle-

---

[15] The number of Central's outstanding shares of common stock and the number of the holders thereof are shown in the table at p. 220 of the Record.

ghany's common stock or more than 10% of the 4,637,797 outstanding shares of such stock, as well as 300,100 shares or almost 5% of Central's outstanding common stock.[16]

D. The Exchange Offer and the New Preferred Stock application (Finance Docket No. 18866):

When Messrs. Young and Kirby undertook to manage Alleghany in 1937, its capital structure was burdened by a staggering load of funded debt, preferred stocks and dividend arrearages. Voluntary recapitalization was a long and difficult process. It involved *inter alia* retirement and redemption of the funded debt, reduction in the size of the preferred stock issues by various means and in successive stages, and elimination of dividend arrearages; and its completion was a condition precedent to resumption of dividends on the common stock (R. 282).[17]

By February 1955 the remaining and culminating step in this process was the voluntary recapitalization of 136,744 shares of Old Preferred Stock, on which dividend arrearages then aggregated more than $130 per share (R. 351). To persuade the holders of Old Preferred Stock to surrender these large preferred claims, it was obviously necessary to offer them compensating inducement.

---

[16] The statement of Mr. Kirby's ownership of 500,000 shares of Alleghany's common stock appears in ¶I(b)1(4) of the merger and lease application. This paragraph has been omitted from the printed Record. The reference to the Unprinted Record will be supplied at or prior to the argument.

The number of Alleghany's outstanding shares of common stock appears in the printed part of the application (R. 220).

The application does not show that Alleghany and Central had another important stockholder in common, Robert R. Young. It will be shown later that this fact, as well as other relevant facts, were before the ICC, and undisputed, when it made the status orders.

[17] Some of the early steps in this process are favorably mentioned in the *Chesapeake Purchase Case*, 261 ICC 239, 246-7.

The problem thus posed was solved by an ingenious offer (Exchange Offer) to exchange, for each share of Old Preferred Stock, 10 shares of New Preferred Stock, redeemable on and after May 1, 1970, and convertible prior to redemption into common stock at a rate determined in accordance with a prescribed formula and upon payment to Alleghany of $3.75 for each share of common stock issued for such conversion (R. 331-367).

Related charter amendments were adopted by a large majority of each class of stockholders entitled to vote thereon, at a special meeting held on February 8, 1955; and the Exchange Offer was made on February 10, 1955 (R. 284-311, 372, 520, 534).[18]

In view of the provisions of the ICC order dated June 5, 1945, the Exchange Offer was conditioned upon ICC approval and authorization under §20a by appropriate order not later than May 31, 1955; and on February 18, 1955 Alleghany filed an application for such an order (R. 332, 371-392).

Before the Exchange Offer expired on June 6, 1955 it was accepted by the holders of more than 130,000 shares of Old Preferred Stock, including the appellants.[19] Under the prescribed formula for its determination, as modified by the ICC (R. 535), the conversion rate for each share of New Preferred Stock deliverable in exchange was fixed at 4.7 shares of common stock.

Since redemption of the relatively few remaining shares of Old Preferred Stock was feasible, consummation of the

---

[18] Alleghany's proxy material relating to the charter amendments was duly submitted to the SEC and thereafter distributed without SEC objection. Later, the Exchange Offer was similarly submitted and distributed.

[19] The Exchange Offer was accepted by the appellants and persons they represent, in respect of 5,715 shares of Old Preferred Stock. (App. ...., pp. .....).

Exchange Offer meant the elimination of all the Old Preferred Stock (including dividend arrearages aggregating approximately $18,000,000), the substitution of approximately 1,300,000 shares of New Preferred Stock on a current basis, and the possible resumption of dividends on the common stock. And future conversion of the New Preferred Stock would swell Alleghany's capital at the rate of $17.625 per share—a potential aggregate capital increase of approximately $23,000,000.

E. The Boston & Albany Proceeding before the ICC:

On December 16, 1954 Central and Alleghany filed with the ICC a joint application respecting the acquisition of control through stock ownership of three carriers whose properties were leased to Central (R. 565-599). Central sought authority to acquire direct control through stock ownership; and Alleghany sought authority to acquire resultant indirect control. Even under the District Court's restrictive interpretation of §5(2) it is beyond dispute that Alleghany was a necessary party. Except for its statement that Alleghany then owned directly 279,400 shares of Central stock, this application stated the same facts as the merger and lease application, respecting Alleghany's acquisition of control of Central (R. 575-578).

Like the merger and lease application, this application also requested an order "containing the condition that Alleghany shall continue to be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Act, as provided by Section 5(3) thereof" (R. 594).

The appellees did not seek to intervene.

On March 22, 1955, the ICC issued a report and order which authorized these acquisitions of control (R. 450-473). In respect of Alleghany's control of Central the report

found (R. 452-453): that Alleghany and Central had two common directors, of whom one was a common Chairman and the other was Alleghany's President; that Alleghany and Central had a common Vice President; that Central's stock was widely held; that Alleghany had an undivided interest in 600,000 shares of Central stock and full voting rights to all such shares; that it owned 279,400 additional shares directly; that its voting rights represented 14% of all outstanding Central stock; and that the voting rights of Alleghany, its Chairman and its President represented 20% of all outstanding Central stock. The undisputed record before it also showed that Alleghany and Central had at least one important stockholder in common (the President of Alleghany and a director of Central), who owned 500,000 shares or more than 10% of Alleghany's outstanding common stock and 300,100 shares or almost 5% of Central's outstanding common stock (R. 575, 577).

Like the virtually identical undisputed facts in the merger and lease proceeding, these facts compel a finding that Alleghany controlled Central within the meaning of §I(3)(b). Such a finding is plainly implicit in the report; and the report is incorporated in the accompanying order by reference (R. 471).

Neither the report nor the accompanying order expressly granted the prayer of the application that Alleghany should continue to be considered as a carrier subject to §§20(1)-10 and 20a(2)-(11). But it referred to the similar provisions of the first status order (R. 453); and it can reasonably be interpreted as incorporating those provisions by reference. Since the report itself is incorporated in the accompanying order by reference, such an interpretation would provide an independent jurisdictional basis for the preferred stock orders. And, if the District Court erred in holding that ICC approval under §5(2), of Alle-

ghany's acquisition of control of Central, is a condition of ICC jurisdiction to approve subsequent transactions by Alleghany within the scope of that section, such an interpretation would alone require reversal.

If, however, such an interpretation is rejected, and even if that holding is correct, remand would enable the ICC to cure its failure to act under §§5(2) and 5(3) in the Boston & Albany proceeding.

F. *Breswick & Co.* v. *Briggs*, and the decisions therein reported at 130 F. Supp. 953 and 135 F. Supp. 397:

In February 1955 two of the appellees brought a derivative action (*Breswick & Co.* v. *Briggs*) in the right of Alleghany against its directors and others in the district court below. The relevant counts of the complaint in that action rest on the theory: that Alleghany became an investment company subject to the Investment Company Act, upon its divestment of control over Chesapeake on January 19, 1954; and that the individual defendants are liable in respect of certain later transactions which, except for that Act, were otherwise lawful.[20]

• • • • • •

Shortly after the New Preferred Stock application was filed, the plaintiffs in *Breswick & Co.* v. *Briggs* moved to enjoin Alleghany from proceeding in respect thereof before the ICC, "Upon the claim that Alleghany Corporation is an investment company subject to regulation by the Securities and Exchange Commission, rather than a carrier subject to regulation by the Interstate Commerce Commission."[21] Like the identical later claim of the appellees here, this claim was based on the proposition that the

[20] The complaint also alleges that these transactions involved breaches of fiduciary duty.

[21] *Breswick & Co.* v. *Briggs*, 130 F. Supp. 953, 954.

ICC order dated June 5, 1945 lapsed on January 19, 1954 when Alleghany relinquished control of Chesapeake.

In support of this claim the plaintiffs contended "that control of a single railroad system (Central) does not bring Alleghany within the Interstate Commerce Act" and that, if it did, "Alleghany does not in fact control" Central.[22]

The district court held that the question of control "should first be determined by the I. C. C. and the courts reviewing its proceedings" and relegated the plaintiffs "to the exhaustion of their remedies before the I. C. C. and before the court having jurisdiction to review the determination of that agency."[23] The motion was accordingly denied.

Although the question of the plaintiffs standing to sue under the Urgent Deficiencies Act was not before it, the district court expressed the view that the plaintiffs "have the right to challenge the jurisdiction of the I. C. C." and "cannot be estopped by management's acquiescence to unauthorized regulation."[24] In support of this dictum it cited *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (1936) and *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936).[25]

* * * * * *

In an opinion delivered on September 28, 1955 in *Breswick & Co.* v. *Briggs*, the same judge, who was then a member of the three-judge court below, in effect dismissed the defense of reliance on the continuing validity of the ICC order dated June 5, 1945 and the SEC order date October 4,

---

[22] *Id.* As to the first of these contentions, the same plaintiffs in the case at bar argued the precise opposite below.

[23] *Id.*

[24] *Id.*, p. 956.

[25] *Ashwander* was a plenary stockholder's derivative action in the right of the corporation. *Carter* involved three actions, of which two were plenary stockholders' derivative actions and the third was a plenary action by corporations to enjoin the collection of taxes. Both cases raised constitutional questions.

1945. He held that "as a matter of law, their lack of legal effect was so obvious that professed reliance upon them in good faith is patently frivolous."[26]

He thus held by necessary implication that, as a matter of law, the individual defendants could not and did not rely in good faith on the express provisions of these orders, the literal mandate of §15(2), the duty of compliance imposed by §16(7), the provisions of §40(a) of the Investment Company Act, the SEC's recognition of the continuing validity of the order dated June 5, 1945, the pointed ICC quotation to Alleghany on February 5, 1954 of the provision in that order for its continuing force and effect (R. 187-188), the ICC ruling on February 15, 1955,[27] and the subsequent similar ruling on March 2, 1955 that, regardless of any change in the facts on which that order was based, its jurisdiction and Alleghany's status as a carrier continued "unless and until we order an appropriate change" (R. 424).[28]

---

[26] *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, 400.

[27] In its order dated February 15, 1955, which denied the petition filed on February 4, 1955 by one of the appellees for leave to intervene in the merger and lease proceeding, the ICC held (R. 369-370):

> "That the Commission has entered no order changing or modifying the order of June 5, 1945, in Finance Docket No. 14692, and that *Alleghany's status as a carrier subject to the Act will remain in force and effect* pending final determination of the proceeding instigated by the Commission on June 22, 1954, ordering Alleghany to show cause why the said order of June 5, 1945, so far as it applied to Alleghany, should not be vacated and set aside and be no longer of any force and effect."

[28] The district judge was silent about the good faith of the SEC in recognizing the ICC's continuing jurisdiction under, and Alleghany's continuing duty of compliance with the order dated June 5, 1945; and he was also silent about the good faith of the ICC in writing the letter and making the rulings to which the text refers. But, with respect to the status orders, he said (*Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, 400): "An order of the I. C. C. which obliquely attempted to validate Alleghany's claim to

Thus, according to this holding, the individual defendants were bound as a matter of law to defy or ignore the literal language of statutes and administrative orders and the rulings of administrative agencies, and involuntarily to accept the risks of punishment and liability under §10(1) and enforcement action under §§5(8) and 16(12).

This holding is a logical result of the novel theory enunciated below of the sudden death of adminstrative orders; and, indeed, it is expressly based on that theory.[29] It vividly illustrates the intolerable burdens and risks with which that theory threatens corporate management.

• • • • • •

The appellants contend that the motion for an injunction in *Breswick & Co.* v. *Briggs* was denied on erroneous grounds,[30] which led to serious error below respecting the scope of judicial power in an action under the Urgent Deficiencies Act, the appellees' standing to sue, the adequacy of their remedy by plenary suit, their right to enforce the Investment Company Act in an action to review ICC orders based solely on the Interstate Commerce Act, and, indeed, their right to enforce the Investment Company Act by injunction in any forum.

Certain aspects of the erroneous grounds of decision in *Breswick & Co.* v. *Briggs* deserve brief remark here:

First: Breswick & Co. v. *Briggs* is a derivative action. The district judge did not deny the motion for an injunction on the ground that the plaintiffs were improperly seeking

---

exemption from the Investment Company Act was temporarily stayed" by the court below. This was a regrettable statement, quite apart from the fact that Alleghany never asserted before the ICC any claim to exemption from the Investment Company Act, and the ICC never presumed to determine any such claim or to grant any such exemption.

[29] *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, 400.

[30] It is not suggested that the motion should have been granted. There were other and sound reasons for its denial; but they are not relevant here.

to enforce independent private rights under the Investment Company Act in a derivative action. He apparently assumed that the plaintiffs were asserting derivative rights, if any, under that Act—as indeed they were. And he apparently held, by implication, that they would have standing to sue upon the basis of derivative rights under that Act in an action under the Urgent Deficiencies Act.

Second: The issue of Alleghany's status under the Investment Company Act was squarely presented by the complaint and the motion for an injunction in *Breswick & Co.* v. *Briggs.* The district court had the power and was under a duty to hear and decide that issue, even if it involved determinations respecting the continuing validity of the ICC order dated June 5, 1945 and the jurisdictional validity as to Alleghany of any order based on the merger and lease application.[31]

In short, assuming that, although §42(e) of the Investment Company Act confides to SEC discretion the remedy of injunction against a threatened violation, the plaintiffs could nevertheless enforce it, the clear jurisdiction of the district court to determine the issue of Alleghany's status under that Act included jurisdiction to decide every question incident to such a determination. If the district court was right in denying the motion for an injunction because it was "premature" and in relegating the plaintiffs "to the exhaustion of their remedies before the I. C. C. and before the court having jurisdiction to review the determination of that agency," then, and for the same reasons, the causes of action based on the claim of such status were prematurely alleged and beyond the power of the district court to determine. But the district court has interposed no such bar to their vigorous prosecution.

---

[31] *Cf. Shannahan* v. *U. S.*, 303 U. S. 596, 603 and fn. 5 at p. 603; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182-184; *Sprague* v. *Woll*, 122 F. 2d 128, cert. den. 314 U. S. 669.

Third: Moreover, if the district court was right in holding that the motion for an injunction was premature, it necessarily follows that an enforcement action by the SEC under §42(e) of the Investment Company Act would also have been premature. But obviously such an action would not have been premature; and the SEC could not be relegated to the exhaustion of remedies before the ICC.

Fourth: In effect, the district judge referred the question of Alleghany's status under the Investment Company Act to the ICC and a court convened under the Urgent Deficiencies Act to review the ICC's determination. But a determination of that question was beyond the ICC's statutory authority and competence; the ICC could not and did not determine it; and the jurisdiction of such a court is limited to a review of questions of procedural propriety and questions of fact and law which the ICC considered and decided or could and should have considered and decided. Thus, the district judge first declined to decide the question of Alleghany's status under the Investment Company Act, although the question was squarely presented in a plenary action and plainly within his power to decide in that action; and then, as a member of the court below, he decided it, although the question was improperly presented in an action under the Urgent Deficiencies Act and beyond the power of the court to decide in such an action.

G. The appellees' pleadings before the ICC in the merger and lease proceeding:

In the proceedings on the merger and lease application the appellees filed several petitions for leave to intervene, accompanied by motions to dismiss or deny and finally for reconsideration. They also adopted by reference other petitions and accompanying motions filed by persons with whom they acted in concert.

The amended petition of one of the appellees, dated February 18, 1955, alleges that "Alleghany Corporation

is not in control of . . . the New York Central" (R. 392);[32] and the amended petition of the appellees and their associates, filed April 11, 1955, which was their last pleading, alleged in effect "that Alleghany has no control of the individual members of the board of Central" (R. 491).

But this last pleading also contained the following allegation (R. 491):

> "7. That each and every petitioner herein hereby seeks to intervene in Nos. 14692 and 18656 on the grounds and for the reasons set forth in the petitions for intervention filed on January 11, 1955, February 4, 1955, February 21, 1955 and March 29, 1955."

The petition filed January 11, 1955, which was thus incorporated by reference in the appellees' last pleading, contains the following allegations (R. 278):[33]

> ". . . Alleghany has not only acquired a large and controlling stock interest in the New York Central Railroad Company, but it has exercised that control by electing an Alleghany slate of directors to take over the management of the New York Central system. Those directors have now removed officers from the New York Central company and its underlying companies, and elected officers in their place. The senior officer of Alleghany, Mr. R. R. Young, has, for example, been installed as the senior and dominant officer of the New York Central . . ."

And the petition filed February 4, 1955, which was similarly incorporated by reference in the appellees' last pleading, contains the following allegations (R. 322):[34]

> "In spite of this prohibition, during the period January 19, 1954 to June 13, 1954, the Alleghany

---

[32] This allegation was cited by the District Court as an example of the specific denial required by Rule 19 of the ICC Rules of Practice (R. 670-671).

[33] This petition refers to and includes the accompanying motions to dismiss and to deny (R. 270).

[34] This petition also refers to and includes the accompanying motion to deny (R. 318).

> Corporation and its nominees Robert R. Young, Allan P. Kirby and the 13 other present members of New York Central's Board of Directors (except Alfred E. Perlman) by stock purchases and the solicitation of proxies and other acts in interstate commerce sought to acquire and did acquire control of the applicant railroad and bridge companies herein.
>
> "By reason of said prohibited and unlawful acts Alleghany Corporation and its nominees were successful in acquiring on June 14, 1954 the control of the New York Central Railroad Company and its system companies, and since June 14, 1954 Alleghany and its nominees have taken further steps by stock purchases and otherwise to consummate and consolidate their control, including the appointment of various officers and counsel of Alleghany as officers and counsel of New York Central."

Thus, in their last pleading before the ICC in the merger and lease proceeding, the appellees simultaneously alleged and denied Alleghany's control of Central.

Obviously, this last pleading contradicted itself and raised no issue respecting Alleghany's control of Central and, as to that issue, the ICC was entitled to treat it as a nullity.

* * * * * *

But, even if this contradiction is disregarded, the appellees' pleadings are nevertheless totally insufficient. The point of cardinal importance, on the question of control within the meaning of §1(3)(b), is that *none of the appellees' pleadings denied any of the specific and significant facts stated in the merger and lease application,* respecting common directors, a common Chairman, a common Vice-President, at least one common important stockholder, the wide distribution of Central's stock, Alleghany's concentrated voting power, and the additional voting power of its Chairman and its President.[35]

---

[35] These facts are reviewed *supra,* pp. 17-18.

Indeed the appellees relied on those facts before the ICC and the district court as proof of individual control of Central, although most of them are specified in §1(3)(b) as separately sufficient indicia of corporate control. And not the least remarkable feature of this remarkable case is the circumstance that the district court not only gave evidence to the appellees' interpretation of those facts, but determined the adequacy of the ICC's finding of control by Alleghany *without reference to the definition of control in §1(3)(b)* (R. 621-624).[36]

H. The proceedings before the ICC:

In its order dated February 15, 1955, denying the petition filed on February 4, 1955 by one of the appellees for leave to intervene in the merger and lease proceeding, the ICC held (R. 370):

> "... That the interests of the said petitioner are not shown to pertain to the terms and conditions of the proposed merger, modification of lease, and resulting internal rearrangement of the applicants' corporate structure, *and are not shown to be different from the interests of all other holders of the same classes of stock of Alleghany and Central.*"[37]

On reconsideration of the Division 4 report and first status order dated March 2, 1955, and apparently in deference to a dictum in *Breswick & Co.* v. *Briggs*, the full Commission permitted the appellees and their associates to intervene in the merger and lease proceeding as of May 24, 1955, the date of the report and second status order of the full Commission (R. 507, 508, 517).

It is submitted that the appellees had no more standing to intervene before the ICC than they have standing to sue here, and that the ICC was plainly right the first time.

---

[36] None of the opinions below even mentions either §1(3)(b) or §5(4).

[37] A similar ruling was made in the ICC order dated February 9, 1955, which denied the petition for leave to intervene filed on January 11, 1955 by the appellee's associates (R. 326).

APPENDIX B.

The defenses alleged in the answer of these appellants to the original complaint, as amended by the oral stipulation made before and approved by the District Court on June 13, 1955.

As a First Defense:

19. (a) The facts alleged in the complaint and admitted in the paragraphs hereof numbered 1, 7(a), 8(a), 9(a), 12(a), 15(a) and 16(c) and (d) are repeated by reference thereto.

(b) The facts admitted and alleged in the paragraphs hereof numbered 3, 4, 10, 11(b) and 14(a) and (b) are repeated by reference thereto.

20. (a) Until June 22, 1955, and for a long preceding period, 136,744 shares of ALLEGHANY's Cumulative 5½% Preferred Stock Series A (Old Preferred Stock), having a par value of $100 per share, were issued and outstanding.

(b) On or about February 1, 1955 the accumulated and unpaid dividends thereon aggregated $132 per share.

(c) On February 8, 1955 a special meeting of ALLEGHANY's stockholders was duly held to consider and vote on proposed charter amendments:

(i) creating a new class of 6% Convertible Preferred Stock (New Preferred Stock), convertible into shares of common stock and having a par value of $10 per share, and authorizing the issuance of 1,367,440 shares of New Preferred Stock in exchange for Old Preferred Stock, at the rate of 10 shares of New Preferred Stock for each share of Old Preferred Stock; and

(ii) authorizing the issuance of 9,650,000 additional shares of common stock, in order to provide a sufficient

number of such shares for possible future conversion of New Preferred Stock.

(d) The holders of substantially more than the requisite number of shares of each class of ALLEGHANY's stock, who were entitled to and did vote in respect of the proposed amendments, voted in favor thereof; and ALLEGHANY's charter was thereupon duly amended in accordance therewith.

(e) The proposed amendments were approved by the holders of 3,269,217 shares of ALLEGHANY's common stock, which constituted approximately 70% of all the then outstanding shares of such stock and more than 97% of all such shares voted in respect thereof.

(f) The written matter used by ALLEGHANY's management in soliciting proxies to vote in favor of the proposed amendments was submitted to and approved by the SEC; and the plaintiffs have never complained to the SEC that such matter misrepresented or omitted any material fact.

(g) On February 10, 1955 ALLEGHANY made a written Exchange Offer to the holders of Old Preferred Stock, in accordance with its charter as thus amended and pursuant to a resolution adopted by the Executive Committee of ALLEGHANY's Board of Directors at a special meeting held on February 9, 1955.

(h) The Exchange Offer was conditioned upon:

(i) authorization by the ICC not later than May 31, 1955 of the issuance of New Preferred Stock, pursuant to the Exchange Offer; and

(ii) acceptance thereof, within the time specified therein, by the holders of not less than 100,000 shares of Old Preferred Stock or of such lesser number as ALLEGHANY might deem sufficient to warrant its consummation.

(i) On February 18, 1955 ALLEGHANY filed with the ICC an application for an order authorizing it under Sec-

tion 20a of the Interstate Commerce Act to issue 1,367,440 shares of New Preferred Stock, in connection with and pursuant to the Exchange Offer. The proceedings on that application were partially entitled "Finance Docket No. 18866".

(j) By a report and an order dated May 26, 1955 the ICC, by its Division 4, granted that application.

(k) On June 2, 1955 the plaintiffs filed with the ICC a petition requesting reconsideration of said report and order dated May 26, 1955.

(l) By an order dated June 22, 1955 the ICC, among other things, denied said petition for reconsideration and declared said order dated May 26, 1955 effective as of June 22, 1955.

(m) Within the time specified in the Exchange Offer, the holders of approximately 132,000 shares of Old Preferred Stock accepted it by depositing the stock certificates representing those shares with The Marine Midland Trust Company of New York (Exchange Agent) and by executing and delivering or causing the execution and delivery to the Exchange Agent of the Letter of Transmittal which accompanied it.

(n) Prior to June 22, 1955 a stock certificate or stock certificates, representing the number of shares of New Preferred Stock to which each holder of Old Preferred Stock who accepted the Exchange Offer would become entitled when it became binding and operative, were duly executed by ALLEGHANY in favor of such holder or his designated nominee, duly countersigned, and deposited with the Exchange Agent for exchange thereunder.

(o) Upon the filing on June 22, 1955 by the ICC of the order mentioned in subparagraph (l) of this paragraph 20:

(i) the Exchange Offer by its terms became binding on ALLEGHANY and all the holders of Old Preferred Stock who had theretofore accepted it;

(ii) the Exchange Offer by its terms became operative;

(iii) the shares of New Preferred Stock and the stock certificates therefor, referred to in subparagraph (n) of this paragraph 20, became validly issued and immediately deliverable; and

(iv) the holders of Old Preferred Stock who had theretofore accepted the Exchange Offer, or their designated nominees, became the lawful owners of record of said shares of New Preferred Stock and stock certificates therefor.

21. (a) The Letter of Transmittal which accompanied the Exchange Offer required the holders of Old Preferred Stock who accepted it to instruct the Exchange Agent to deliver New Preferred Stock to them either by mail or against receipts for Old Preferred Stock issued to them by the Exchange Agent upon deposit thereof.

(b) Most of those holders of Old Preferred Stock instructed the Exchange Agent to deliver New Preferred Stock to them against such receipts.

(c) Most of such receipts were issued to and held by banks in New York City and New York Stock Exchange firms acting for those holders of Old Preferred Stock.

22. (a) At about 1 P. M. on June 23, 1955 the Exchange Agent received notice of the filing of the ICC order mentioned in paragraph 20(l) hereof, and began delivery of New Preferred Stock by mail and against such receipts upon presentation thereof.

(b) At about 4:30 P. M. on June 23, 1955 the Honorable Edward J. Dimock, a Judge of this Court, granted an *ex parte* order in this action, which enjoined the issuance, distribution or transfer of the New Preferred Stock pending the hearing and determination of a motion by the plaintiffs for a temporary injunction.

(c) Before notice of that *ex parte* order was served on the Exchange Agent it had delivered, by mail and against such receipts upon presentation thereof, stock certificates for 876,800 shares of New Preferred Stock.

(d) Delivery by mail was so made by the Exchange Agent to all the holders of Old Preferred Stock who had requested such delivery.

(e) On July 26, 1955 the statutory Court convened to hear this action issued a temporary injunction which, pending final judgment herein:

(i) enjoined enforcement of or action pursuant to the portions of said ICC orders dated March 2, 1955 and May 24, 1955 which continued ALLEGHANY's status as a carrier and approved its continued control of Central;

(ii) enjoined enforcement of or action pursuant to said ICC orders dated May 26, 1955 and June 22, 1955 which authorized the issuance of New Preferred Stock; and

(iii) enjoined the issuance, distribution or transfer of New Preferred Stock.

(f) On August 9, 1955 the Honorable John M. Harlan, a Justice of the Supreme Court of the United States, granted an order which, pending ALLEGHANY's appeal from said temporary injunction to the Supreme Court of the United States:

(i) stayed said temporary injunction in respect of the issuance, distribution, transfer or conversion into common stock of any of the 876,800 shares of New Preferred Stock delivered by the Exchange Agent on June 23, 1955;

(ii) stayed said temporary injunction in respect of action by ALLEGHANY, respecting said 876,800 shares of New Preferred Stock, pursuant to said ICC orders

dated May 26, 1955 and June 22, 1955 which authorized the issuance of New Preferred Stock; and

(iii) denied similar relief for the benefit of the former holders of Old Preferred Stock who still held such receipts.

23. (a) The defendant BAKER, WEEKS & Co., a limited partnership, is a member firm of the New York Stock Exchange. Its general partners are Hugh B. Baker, Frank E. Baker, K. P. Tsolainos, James A. Edgar, Otto E. Dohrenwend, Paul Sturtevant, William B. Bohen, Schroeder Boulton, William D. Asby, William R. Kaelin, John J. Henneberry, Herbert K. Crabtree and Arthur A. McLaughlin. The limited partner is the Estate of George K. Weeks.

(b) In and prior to 1951 said defendant bought for the account of certain of its customers, and held for their account until the deposit thereof under the Exchange Offer, an aggregate of 2,435 shares of Old Preferred Stock.

(c) On and between February 11, 1955 and June 2, 1955 the Exchange Offer was accepted in respect of all those shares of Old Preferred Stock, the stock certificates therefor were deposited with the Exchange Agent, the Exchange Agent was instructed to deliver New Preferred Stock against receipts, and it issued receipts accordingly.

(d) Said defendant has since held and still holds those receipts for the account of such customers.

(e) Said defendant has been authorized and instructed by such customers to take all action on their behalf necessary to effectuate consummation of the Exchange Offer in respect of those receipts, including intervention as a party defendant in this action.

(f) Said defendant has a financial interest in the conduct and outcome of this action, arising out of the circumstance that it did not present those receipts to the Exchange Agent and obtain delivery of New Preferred Stock during the period on June 23, 1955 when it could have done so.

24. (a) The defendant, Oscar Gruss & Son, a partnership, is a member firm of the New York Stock Exchange and the National Association of Securities Dealers, Inc. Its partners are Oscar Gruss and Emanuel Gruss.

(b) Prior to June 23, 1955: said defendant bought for its own account 1,230 shares of Old Preferred Stock and accepted the Exchange Offer in respect thereof; and the stock certificates therefor were deposited with the Exchange Agent, the Exchange Agent was instructed to deliver New Preferred Stock against receipts, and it issued receipts accordingly.

(c) On June 23, 1955, receipts for 200 of those shares were presented to the Exchange Agent, which then delivered 2,000 shares of New Preferred Stock in exchange therefor.

(d) Said defendant still holds such receipts in respect of 1,030 shares of Old Preferred Stock.

(e) Since on or about February 10, 1955 New Preferred Stock has been traded on a when-issued basis in the over-the-counter market maintained by members of the National Association of Securities Dealers, Inc.

(f) Said defendant has sold 9,990 shares of New Preferred Stock on a when-issued basis, with the expectation and intention of delivering them out of the shares of such stock it would receive upon consummation of the Exchange Offer.

(g) Most of those 9,990 shares were so sold prior to June 23, 1955.

(h) Said defendant has also bought 6,490 shares of New Preferred Stock on a when-issued basis, with the expectation and intention of receiving delivery thereof upon consummation of the Exchange Offer.

(i) Most of those 6,490 shares were so bought prior to June 23, 1955.

(j) Said defendant has been and still is unable to consummate such sales and purchases of New Preferred Stock.

25. (a) Prior to June 23, 1955 the defendant Oscar Gruss & Son bought for and delivered to certain of its customers 600 shares of Old Preferred Stock, which were held by such customers until the deposit thereof under the Exchange Offer.

(b) Prior to June 23, 1955 the Exchange Offer was accepted in respect of all those shares of Old Preferred Stock, the stock certificates therefor were deposited with the Exchange Agent, the Exchange Agent was instructed to deliver New Preferred Stock against receipts, and it issued receipts accordingly.

(c) On June 23, 1955 receipts for 200 of those shares were presented to the Exchange Agent, which then delivered 2,000 shares of New Preferred Stock in exchange therefor.

(d) Such customers still hold such receipts in respect of 400 shares of Old Preferred Stock.

(e) Said defendant has been authorized and instructed by such customers to take all action on their behalf necessary to effectuate consummation of the Exchange Offer in respect of those receipts, including intervention as a party defendant in this action.

26. (a) The defendant Irving Neuman is Trustee under a Deed of Trust dated and executed and delivered to him on November 6, 1943 by Oscar Gruss for the benefit of Olga Gruss and Elizabeth Gruss.

(b) Prior to June 23, 1955 said defendant, as such Trustee, bought 1,150 shares of Old Preferred Stock, which were held for his account until the deposit thereof under the Exchange Offer.

(c) Prior to June 23, 1955 the Exchange Offer was accepted in respect of all those shares of Old Preferred Stock, the stock certificates therefor were deposited with the Exchange Agent, the Exchange Agent was instructed to deliver New Preferred Stock against receipts, and it issued receipts accordingly.

(d) On June 23, 1955 receipts for certain of those shares were presented to the Exchange Agent, which then delivered shares of New Preferred Stock in exchange therefor.

(e) Such receipts are still held for the account of said defendant, as such Trustee, in respect of the remainder of those shares.

27. (a) On May 31, 1955 the defendant EDWARD GORNISH bought 300 shares of Old Preferred Stock.

(b) On June 3, 1955 the Exchange Offer was accepted in respect of all those shares of Old Preferred Stock; and subsequently the stock certificates therefor were duly deposited with the Exchange Agent, the Exchange Agent was instructed to deliver New Preferred Stock against receipts, and it issued receipts accordingly.

(c) Those receipts have since been and are still held by a New York Stock Exchange firm for the account of said defendant.

28. (a) As a matter of both fact and law, the essential purpose and function of the *ex parte* order referred to in paragraph 22(b) hereof and of the temporary injunction referred to in paragraph 22(e) hereof was to maintain the *status quo* in respect of the Exchange Offer, pending final judgment, by preventing delivery of New Preferred Stock thereunder to the holders of Old Preferred Stock who had accepted the Exchange Offer and thus preventing subsequent transfers of New Preferred Stock to *bona fide* purchasers for value.

(b) The ultimate objective of so maintaining the *status quo* was preservation of the power of the Court to render an effective final judgment in favor of the plaintiffs respecting consummation of the Exchange Offer.

(c) Such an effective final judgment must restore the *status quo*.

(d) Because of the facts stated in the following paragraphs 29, 30 and 31 hereof:

(i) the power of the Court to render such an effective final judgment was already impaired when the *ex parte* order was granted, and has since been destroyed;

(ii) even if such power still exists, numerous parties necessary for its effective exercise are not before the Court and cannot be brought and kept there; and

(iii) even if such power still exists, and even if all the necessary parties were before the Court, it could not render a final judgment against many of them.

29. (a) Trading in New Preferred Stock on a regular basis began on the New York Stock Exchange and in the over-the-counter market on June 23, 1955, upon notice of the filing of the ICC order mentioned in paragraph 20(1) hereof.

(b) On that day, before the *ex parte* order was granted, 2,400 shares of New Preferred Stock were sold on the New York Stock Exchange on a regular basis by the holders thereof to *bona fide* purchasers for value.

(c) On that day, before the *ex parte* order was granted, many more shares of New Preferred Stock were sold in the over-the-counter market on a regular basis by the holders thereof to *bona fide* purchasers for value.

30. (a) Since August 9, 1955, the date of the order of the Supreme Court of the United States mentioned in paragraph 22(f) hereof, many thousands of shares of New Preferred Stock have been sold by the holders thereof to *bona fide* purchasers for value.

(b) Such sales continue to be made.

(c) Between August 9 and August 26, 1955, J. P. Morgan & Co., Incorporated, ALLEGHANY's transfer agent for New Preferred Stock, recorded transfers of more than 15,000 shares of New Preferred Stock from the original holders thereof to other persons.

(d) The nominal holders of many of the stock certificates for New Preferred Stock which were delivered by the Exchange Agent on June 23, 1955 were New York Stock Exchange firms which have since endorsed them in blank and delivered them to their beneficial owners.

(e) Such street-name certificates can be sold and repeatedly resold without transfer on the records of the transfer agent.

31. The Court cannot restore the *status quo* and therefore cannot render such an effective final judgment because, among other reasons:

(a) restoration of the *status quo* requires *inter alia*:

(i) surrender and cancellation of the stock certificates for all the issued and outstanding New Preferred Stock; and

(ii) reissuance of Old Preferred Stock in exchange;

(b) a final judgment requiring such surrender would not be enforceable against holders of New Preferred Stock certificates who are not parties to this action;

(c) the numerous and continuing sales mentioned in paragraphs 30(a), (b) and (c), and the facts stated in paragraphs 30(d) and (e), make it impossible to bring and keep all the holders of such certificates before the Court;

(d) even if all the recorded transferees and all the other *bona fide* purchasers of New Preferred Stock could be brought and kept before the Court, no final judgment could be rendered against them; and

(e) the Court cannot compel performance of all the steps of corporate procedure which must precede reissuance of Old Preferred Stock.

As A Second Defense:

32. The facts referred to in paragraph 19 and the allegations in paragraphs 20-31 hereof are repeated by reference thereto.

33. (a) A proper determination of whether or not a final judgment should be granted, which would invalidate the ICC's orders authorizing the issuance of New Preferred Stock, attempt to restore the *status quo* respecting the already issued and outstanding New Preferred Stock, and prevent further consummation of the Exchange Offer, requires the Court to balance the equities in favor of the plaintiffs against the equities in favor of the defendants who received New Preferred Stock on June 23, 1955, the defendants who still hold receipts (including these defendants), the *bona fide* purchasers of New Preferred Stock for value, the members of the general public who might buy unsurrendered New Preferred Stock in ignorance of such a final judgment, and all other persons similarly situated.

(b) Those equities are set forth in the following paragraphs 34-38 hereof.

34. (a) In respect of the Exchange Offer, the claimed equities in favor of the plaintiffs are:

(i) that the net asset value per share of their common stock would be diluted if the Exchange Offer were consummated and all or substantially all the New Preferred Stock were converted into common stock under certain assumed future circumstances; and

(ii) that the plaintiffs have been deprived of the benefits of a determination by the SEC respecting the fairness of the Exchange Offer.

(b) The first of those claimed equities is a claim of possible future money damage which can be and has been fully bonded; and it is outweighed by the following considerations, among others:

(i) The privilege of conversion into common stock, with resultant dilution of the existing common stock equity if the privilege is exercised, has long been and still is a reasonable, beneficial and often necessary feature of corporate securities issued in this country, and has been and is being regularly approved by the holders of the common stock which would suffer such dilution.

(ii) The conversion privilege here was reasonable and necessary to induce acceptance of the Exchange Offer and thus secure substantial and at least fully compensating benefits for ALLEGHANY and its common stockholders.

(iii) Consummation of the Exchange Offer will result in immediate and compensating benefits to ALLEGHANY and its common stockholders, including: Elimination of the huge dividend arrears on Old Preferred Stock which have barred dividends on the common stock; a resultant substantial increase in the net asset value per share of the existing common stock; and avoidance of the undesirable alternative of redeeming Old Preferred Stock and suffering resultant drastic impairment of ALLEGHANY's capital resources and earning assets.

(iv) Substantial exercise by the holders of New Preferred Stock of their privilege of conversion is improbable in the foreseeable future.

(v) Conversion of New Preferred Stock cannot be forced until the redemption date thereof on May 1, 1970.

(vi) It is reasonably certain that substantial conversion will not occur unless the dividend yield on the

number of shares of common stock into which each share of New Preferred Stock is convertible exceeds the dividend yield on each such share.

(vii) It is reasonably certain that the achievement of such a common stock dividend yield would be accompanied by substantial increases in the asset and market values of the existing common stock.

(viii) Because the conversion privilege is coupled with the obligation to pay ALLEGHANY $3.75 for each share of common stock into which conversion is effected, substantial exercise thereof would result in a large increase of ALLEGHANY's capital resources and earning assets.

(ix) After full disclosure to them of all the material facts, including the possible future dilution of their asset equity in case of substantial future conversion, the common stockholders who voted on the charter amendments relating to the Exchange Offer voted therefor almost unanimously.

(c) The second of the claimed equities in favor of the plaintiffs is insubstantial for the following reasons, among others:

(i) It assumes that ALLEGHANY was subject to regulation by the SEC under the Investment Company Act of 1940 when the ICC approved the Exchange Offer.

(ii) Even if the plaintiffs prevail, a final judgment in their favor must direct further hearings and findings by the ICC respecting ALLEGHANY's control of CENTRAL and its acquisition of such control.

(iii) Hence the second claimed equity rests on an assumption that cannot be established in this action and may never be established otherwise.

35. The equities in favor of these defendants are stated below:

(a) The receipts referred to in paragraphs 23-27 have not been marketable since the *ex parte* order was granted on June 23, 1955.

(b) Since then they have not been acceptable as loan collateral.

(c) The large investments they represent have since been frozen and, if consummation of the Exchange Offer is permanently enjoined, will remain frozen into the distant future.

(d) The market value of those investments on June 23, 1955 was more than $2,000,000.

(e) The following are examples of the serious resultant hardship and damage which has already been suffered:

(i) The defendant Oscar Gruss & Son was forced to liquidate investments it wished to retain, in order to pay loans which were fully secured by its receipts until the *ex parte* order was granted.

(ii) Such liquidation has already resulted in substantial damage; and, in addition, the payment of such loans has reduced the useful capital of said defendant by more than $250,000.

(iii) The frozen investment of the defendant Edward Gornish, aggregating approximately $86,000, constitutes a major part of his capital resources; his ability to carry on his regular business has been seriously impaired; and he has already suffered substantial damage.

(f) Such hardship and damage continues and threatens to become irreparable.

(g) The freezing of those large investments prevents liquidation thereof to avoid possible depreciation in market value, and compels involuntary, indefinite and possibly ruinous speculation.

(h) In the meantime those investments will not produce any income because ALLEGHANY cannot declare and pay dividends either on the deposited Old Preferred Stock or on the undelivered New Preferred Stock.

(i) The defendant OSCAR GRUSS & SON is also enmeshed in serious uncertainty and confusion respecting the status and enforceability of the when-issued contracts referred to in paragraphs 29(f)-(j), and may suffer substantial losses in respect thereof.

(j) The defendant EDWARD GORNISH bought all his Old Preferred Stock and the defendants OSCAR GRUSS & SON and IRVING NEUMAN as Trustee bought some of their Old Preferred Stock after the filing of the ICC order dated May 26, 1955 which approved the Exchange Offer, in reliance on said order and without knowledge that its validity would or could be challenged in this action.

(k) The defendant OSCAR GRUSS & SON entered into many of said when-issued contracts after the filing of said order, in similar reliance thereon and without knowledge that its validity would or could be challenged in this action.

36. In varying degree, all the numerous New York Stock Exchange firms and members of the general public who hold such receipts are similarly situated and similar equities exist in their favor.

37. Substantial equities exist in favor of the *bona fide* purchasers of New Preferred Stock for value, because they will suffer loss of income and market value unless ALLEGHANY's right to declare and pay dividends on their stock is confirmed by the final judgment.

38. Substantial equities exist in favor of the general public, because a final judgment which invalidates the already issued and outstanding New Preferred Stock, but cannot enforce the surrender of all the certificates therefor, would expose its members to the danger of innocent purchase of unsurrendered certificates.

39. A balancing of the equities mentioned in paragraphs 35-38 against those mentioned in paragraph 34 must result in denial of a permanent injunction restraining consummation of the Exchange Offer.

As a Third Defense:

40. The facts referred to in paragraph 19 and the allegations in paragraphs 21-27 hereof are repeated by reference thereto.

41. Pursuant to Section 15(2) of the Interstate Commerce Act and the terms of the ICC order dated June 5, 1945, which is referred to in paragraph 21 of the complaint, that order continued in force until it was superseded by the ICC orders dated March 2, 1955 and May 24, 1955.

42. By their terms, those superseding orders terminated the effective portions of the order dated June 5, 1945.

43. If those superseding orders are invalid, they did not terminate the order dated June 5, 1945, and it continues in force.

As a Fourth Defense:

44. The facts referred to in paragraph 19 and the allegations in paragraphs 21-27 hereof are repeated by reference thereto.

45. Pursuant to Section 40(a) of the Investment Company Act of 1940 and the terms of the SEC order dated October 4, 1945, which is mentioned and quoted in paragraph 14(a) hereof, that order could not be revoked, suspended or modified except by a subsequent order issued after appropriate notice and opportunity for hearing.

46. No such subsequent order of revocation, suspension or modification has ever been issued, and the order dated October 4, 1945 continues in full force and effect.

As a Fifth Defense:

47. The facts referred to in paragraph 19 and the allegations in paragraphs 21-27 hereof are repeated by reference thereto.

48. The ICC has discretionary power to exclude issues which unduly broaden the scope of any application; and the denial of an evidentiary hearing of which the plaintiffs complain was a reasonable exercise of that power in respect of the application mentioned in paragraph 5 of the complaint.

49. The finding of the ICC that ALLEGHANY controls CENTRAL is based on enough evidence to conclude the Court in respect thereof.

50. The approval by the ICC of ALLEGHANY's continued control of CENTRAL reasonably implies approval of the acquisition of such control, and should be so construed.

51. The finding of the ICC that "continued control will be consistent with the public interest" reasonably implies a finding that acquisition of control was consistent with the public interest, and should be so construed.

APPENDIX C.

Additional defense alleged in the answer of these Appellants to the Supplemental Complaint.

* * * * * *

As a Fifth Defense:

20. The facts referred to in paragraph 15 hereof and the allegations in paragraphs 20-27 of said answer are repeated by reference.

21. The shares of New Preferred Stock and the stock certificates therefor, referred to in paragraph 20(n) of said answer, were issued on June 22, 1955 in accordance with all the terms and conditions of the ICC order dated June 22, 1955 which authorized the issuance thereof. Section 20a(11) of the Interstate Commerce Act provides in relevant part as follows:

> "... but no security issued ... in accordance with all the terms and conditions of such an order of authorization therefor ... shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization."

22. In accordance with that statutory mandate the validity of said shares of New Preferred Stock and the stock certificates therefor does not depend on, and may not be affected by any judgment of this Court respecting the validity of the status orders challenged by the original complaint.

Certificate of Service.

I hereby certify that on March 15, 1957 I transmitted for filing with the Supreme Court of the United States the signed original and 25 conformed copies of the foregoing Statement, and duly served by mail conformed copies thereof, postage prepaid, addressed to the following persons:

EDWARD M. GARLOCK

GEORGE BRUSSEL, JR., Esq.
141 Broadway
New York 6, N. Y.

Mr. RANDOLPH PHILLIPS
53 East 74th Street,
New York 21, N. Y.

LIBRARY,
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 25 1956
HAROLD B. WILLEY, Clerk

No. ~~977~~ 114

In the Supreme Court of the United States

OCTOBER TERM, 1955

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BRESWICK & COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

ROBERT W. GINNANE,
General Counsel,
LEO M. POU,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	4
THE QUESTIONS ARE SUBSTANTIAL	7
CONCLUSION	15
APPENDIX A—Statutes Involved	17

CASES CITED

Baltimore & Ohio R.R. Co. v. *United States*, 264 U.S. 258	3
McLean Trucking Co. v. *United States*, 321 U.S. 67	3, 11
New York Central Securities Co. v. *United States*, 287 U.S. 12	15
Pittsburgh & West Va. Ry. Co. v. *United States*, 281 U.S. 479	15
Scott Bros.—Merger, 45 M.C.C. 196	9
Seaboard Air Line R. Co. v. *Daniel* 333 U.S. 118	15
Standard Freight Lines—Merger, 40 M.C.C. 41	9
United States v. *Marshall Transport Co.*, 322 U.S. 31	3, 8
Wiley & Sons v. *United States*, 85 F. Supp. 542, 338 U.S. 902	11